Supreme Court, U.S.
FILED
94 581 SEP 29 1994
OFFICE OF THE CLERK

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1994

FOSS MARITIME COMPANY,
Petitioner,
vs.
DAVID ETTINGER,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the United States

PETITION FOR WRIT OF CERTIORARI

ROBERT D. FEIGHNER — 70805
Counsel of Record
WILLIAM H. COLLIER, JR. — 97491
MARK W. NELSON — 149425
KEESAL, YOUNG & LOGAN
A Professional Corporation
Catalina Landing —
310 Golden Shore
Post Office Box 1730
Long Beach, California 90801-1730
Telephone: (310) 436-2000
Attorneys for Petitioner
Foss Maritime Company

Bowne of Los Angeles, Inc., Law Printers (213) 627-2200

37 pp

QUESTIONS PRESENTED

1. Did the trial court err in granting an extension within which to file a motion for new trial under FRCP Rule 59(b) given the express prohibition of FRCP Rule 6(b)?

2. Did the appellate court err in dismissing Foss' appeal where the granting of Ettinger's motion for new trial was beyond the trial court's jurisdiction, thereby rendering the granting of that motion appealable?

3. Did the trial court and the appellate court improperly apply the "unique circumstances" doctrine to the timing of the filing of a motion for new trial rather than the filing of a notice of appeal?

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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1994

FOSS MARITIME COMPANY,
Petitioner,
vs.
DAVID ETTINGER,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the United States

PETITION FOR WRIT OF CERTIORARI

FOSS MARITIME COMPANY[1] respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

None of the orders by the trial court or the appellate court below is reported officially and each is reproduced in the

[1]Foss Maritime Company was sued below as "PACTOW." For purposes of United States Supreme Court Rule 29.1, petitioner, Foss Maritime Company, a Washington corporation ("Foss" or "petitioner"), is the parent of Pacific Towboat & Salvage Co., a Nevada corporation doing business in California as Foss Maritime. The parent of Foss Maritime Company is Totem Resources Corporation, a Washington corporation. No other parents or subsidiaries (other than wholly-owned subsidiaries) are reported.

Appendix ("App.") at pages 1a-21a. Judgment upon jury verdict was entered on November 17, 1993 (App. 1a.) The trial court granted Ettinger's "Ex Parte Application for Order Enlarging Time to File a Motion for New Trial" on November 23, 1993. (App. 2a.) Ettinger's motion for new trial was granted on February 22, 1994 and bears a filing stamp dated February 23, 1994. (App. 7a.) The Ninth Circuit's order dismissing Foss' appeal was filed on March 29, 1994. (App. 9a.) The Ninth Circuit's order denying Foss' motion for reconsideration was filed on July 1, 1994. (App. 11a.)[2]

JURISDICTION

The order of the Ninth Circuit Court of Appeals denying Foss' motion for reconsideration was rendered on July 1, 1994. The jurisdiction of this court is invoked under 28 U.S.C. Section 1254.

STATUTES INVOLVED

Rule 6(b) of the *Federal Rules of Civil Procedure* is reproduced as follows:

> 6(b) *Enlargement.* When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the

[2]The clerk of the Ninth Circuit reported that the delay in ruling on Foss' motion for reconsideration was occasioned by the Ninth Circuit's "calling up" and subsequent review of the file below.

act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), Section 60(b), and 74(a), except to the extent and under the conditions stated in them.

STATEMENT OF THE CASE

Ettinger brought an action under the Jones Act (46 U.S.C. Section 688) and federal maritime law for personal injuries sustained. On November 17, 1993, the district court entered judgment for Foss after a jury returned a verdict in favor of Foss and against Ettinger.

On November 23, 1993, the District Court granted Ettinger's ex parte request for an enlargement of time within which to file a motion for new trial under FRCP 59. That motion was then filed on December 16, 1993 and served on Foss on December 17, 1993. Following oral argument on January 24, 1994, the motion was granted.

Foss filed its notice of appeal on February 23, 1994. Its lengthy civil appeals docketing statement (App. 12a) noted the unique jurisdictional aspects of the appeal, emphasizing that the trial court's absence of jurisdiction (due to delay) resulted in immediate appellate jurisdiction of an otherwise interlocutory order.

On March 29, 1994, the Ninth Circuit issued an order dismissing Foss' appeal for lack of jurisdiction, citing *Roy v. Volkswagenwerk Aktiengesellschaft*, 781 F.2d 670 (9th Cir. 1985). Despite the authority cited by Foss in its civil appeals docketing statement, particularly with regard to the inability of the trial court to extend the period for filing a motion under Rule 59, the Ninth Circuit instead merely recited the granting of the extension and dismissed Foss' jurisdictional argument as well as its appeal.

On April 12, 1994, Foss filed a "Motion for Reconsideration of Order Dismissing Appeal." That motion focused upon the narrow jurisdictional exception created by the trial court's granting of the Rule 59 motion beyond the mandatory statutory time limits and therefore beyond the trial court's jurisdiction. Due to the passage of time, Foss inquired as to the status of the motion and was advised that no order had been issued because the appellate court had "called up the file for review." On July 1, 1994, some two and one-half months after it was filed, Foss' motion for reconsideration was denied.

REASONS FOR GRANTING THE PETITION

I.

REVIEW SHOULD BE GRANTED TO RESOLVE THE EXISTING CONFLICT BETWEEN THE CIRCUIT COURTS AS TO THE ABILITY OF THE TRIAL COURT TO EXTEND THE TIME TO FILE A MOTION FOR NEW TRIAL UNDER RULE 59(b)

Rule 6(b) expressly provides that "[T]he court . . . may not extend the time for taking any action under Rule . . . 59(b)." This rule of law is widely established throughout the circuits: *Feinstein v. Moses*, 951 F.2d 16, 19 (1st Cir. 1991); *Kraus v. Consolidated Rail Corp.*, 899 F.2d 1360, 1362 (3d Cir. 1990); *Green v. Bisby*, 869 F.2d 1070, 1072 (7th Cir. 1989); and *Scott v. Younger*, 739 F.2d 1464, 1467 (9th Cir. 1984).

In solitary conflict with these established decisions is the Seventh Circuit's decision in *Eady v. Foerder*, 381 F.2d 980 (7th Cir. 1967), which approves an extension of the time for filing a motion for new trial. This Court should resolve the existing conflict by overruling *Eady v. Foerder* so that decision cannot be improperly utilized either by trial courts

or appellate courts to undermine the purpose and effect of the *Federal Rules of Civil Procedure.*

II.

REVIEW SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE CIRCUITS AS TO WHETHER THE GRANTING OF A MOTION FOR NEW TRIAL IS PROPERLY APPEALABLE WHEN EXERCISED BEYOND THE TRIAL COURT'S JURISDICTION DUE TO DELAY

Prior to this case, the Ninth Circuit had held that while the granting of a new trial is ordinarily an interlocutory and unappealable order, the extra-jurisdictional grant of a motion for new trial is appealable as a final order. *Eaton v. National Steel Products Co.*, 624 F.2d 863 (9th Cir. 1980); *see also Jones & Guerrero Co. Inc. v. Sealift Pac.*, 650 F.2d 1072 (9th Cir. 1981). Similar exceptions recognizing the appealability of an extra-jurisdictional grant of a motion for new trial are recognized in the Eighth Circuit (*Herold v. Burlington Northern, Inc.*, 761 F.2d 1241 (8th Cir. 1985)) and Third Circuit (*National Passenger RR Corp. v. Maylie*, 910 F.2d 1181 (3d Cir. 1990)). No such recognized exceptions appear in various other circuits, including the Seventh Circuit, where instead the decisions establish only the general rule of non-appealability. *See, for instance, Ash v. Georgia-Pacific Corp.*, 957 F.2d 432 (7th Cir. 1992).

Despite the presence of its own authority recognizing the appealability of the grant of Ettinger's motion for new trial (due to its jurisdictional delay), the Ninth Circuit dismissed Foss' appeal, citing the general rule in *Roy v. Volkswagenwerk Aktiengesellschaft*, 781 F.2d 670 (9th Cir. 1985).[3]

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[3]Therefore, this petition presents not only a conflict between circuits, but also inconsistent decisions from the Ninth Circuit. While the existence of an intracircuit conflict may not, by itself, serve as a proper

Review is therefore necessary to establish uniformity on the issue of appealability.

III.

REVIEW SHOULD BE GRANTED BECAUSE THE TRIAL COURT AND NINTH CIRCUIT COURT OF APPEALS HAVE MISAPPLIED THE DOCTRINE OF "UNIQUE CIRCUMSTANCES" IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS

This Court first developed the "unique circumstances" doctrine in *Thompson v. INS*, 375 U.S. 385, 84 S. Ct. 397, 11 L.Ed. 2d 404 (1964), and its companion cases, *Wolfsohn v. Hankin*, 376 U.S. 203, 84 S. Ct. 699, 11 L.Ed. 2d 636 (1964), and *Harris Truck Lines v. Cherry Meat Packers Inc.*, 371 U.S. 214, 83 S. Ct. 283, 9 L.Ed. 2d 261 (1964). In *Thompson*, this Court salvaged an otherwise untimely appeal because the appellant had relied upon the district court's statement that appellant's motion for new trial, though filed 12 days after entry of judgment, had been filed in "ample time," thus leading the appellant to believe that his period for filing the notice of appeal was tolled..

More recently, this Court has further refined the "unique circumstances" doctrine in *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 103 L.Ed. 2d 146, 109 S. Ct. 987 (1989). Declining to save an untimely appeal in *Osterneck*, this Court narrowly limited the *Thompson* holding to its facts, stating:

> By its terms, *Thompson* applies only where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received

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jurisdictional basis before this Court, such intracircuit conflict is not ignored. *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 508 (1950).

> specific assurance by a judicial officer that this act has been properly done. That is not the case here.

(489 U.S. at 179, 103 L.Ed. 2d at 157.)

At issue in all of this Court's decisions involving the "unique circumstances" doctrine was the decision to salvage or reject an untimely appeal.

Following the *Osterneck* decision, various circuit courts have questioned the continued vitality of the doctrine, the Ninth Circuit noting for instance in *In Re Slimick*, 928 F.2d 304, 309 n.7 (9th Cir. 1990), that "[r]ecent decisions of the Court have left in doubt the viability of the unique circumstances doctrine." As such, the "unique circumstances" doctrine does not warrant an unprecedented expansion to the facts of this petition.

Had Ettinger filed a late notice of appeal due to reliance on the district court's enlargement of time for the filing of a motion for new trial, the "unique circumstances" doctrine would at least be properly at issue (although, Foss submits, it would not save Ettinger's appeal under these facts). The facts of this appeal, however, concerning only a late motion for new trial, should not have implicated that doctrine.

Only one reported decision has sought to apply the "unique circumstances" doctrine to a situation other than to an untimely appeal and that opinion, *Eady v. Foerder, supra*, has been severely criticized. In *Eady*, the Seventh Circuit, without explanation, applied the doctrine to allow a district court to enlarge the time for the filing of a new trial motion. *Eady* has been seriously questioned, however, in later opinions even within its own circuit. *Bailey v. Sharp*, 782 F.2d 1366, 1369-74 (7th Cir. 1986); *Varhol v. National RR Passenger Corp.*, 909 F.2d 1557 (7th Cir. 1990). The Seventh Circuit's failure to overrule the *Eady* decision, however, presents a direct conflict among the circuits which this Court should resolve by granting this petition.

IV.

REVIEW SHOULD BE GRANTED TO ALLOW THIS COURT TO PROVIDE GUIDANCE WITH REGARD TO THE TIMING OF MOTIONS FOR NEW TRIAL AND NOTICES OF APPEAL, IN CONJUNCTION WITH THE APPLICATION OF THE "UNIQUE CIRCUMSTANCES" DOCTRINE

This petition raises significant questions concerning both the timing and effect of motions for new trial as well as notices of appeal. More importantly, it provides this Court with a vehicle within which to define the present status of the "unique circumstances" doctrine.

Should a party be allowed to file a motion for new trial beyond the 10-day jurisdictional limit set forth in FRCP 59(b) and FRCP 6(a)? Once it is conceded that the motion for new trial is untimely, should appellate courts properly entertain an exception to the general rule that orders granting motions for new trial are otherwise unappealable? Should the "unique circumstances" doctrine be extended beyond the confines of a late notice of appeal and allowed to serve as an excuse for non-compliance with Rule 59 contrary to this Court's own opinions?

This petition addresses significant issues of procedural law. Given appellate courts' otherwise strict adherence to procedural deadlines, a resolution of the issues raised in this petition is critical. An untimely motion for new trial should not be saved by the "unique circumstances" doctrine. Once salvaged, however, it should at the very least be subject to immediate review. The Ninth Circuit's order dismissing this appeal should be reversed.

CONCLUSION

For these reasons, Foss requests that this Court accept this matter for review.

Dated: September 26, 1994

Respectfully submitted,

ROBERT D. FEIGHNER
Counsel of Record

WILLIAM H. COLLIER, JR.
MARK W. NELSON
KEESAL, YOUNG & LOGAN
Attorneys for Defendant
Foss Maritime Co.

APPENDIX

BEST AVAILABLE COPY

APPENDIX 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DAVID ETTINGER,
Plaintiff,

VS.

PACTOW; "BARGE NO. ONE", her engines, apparel and furniture; and "BARGE NO. TWENTY-SIX", her engines, apparel and furniture,
Defendants.

Case Number: 92-0361-S(M)

JUDGMENT IN A CIVIL CASE

☒ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED judgment is hereby entered in favor of the defendant and against the plaintiff.

November 17, 1993
Date

DON E. HENDRIX
Clerk

RAY J. BLANCHARD
(By) Deputy Clerk Ray J. Blanchard

APPENDIX 2

FILED NOVEMBER 20, 1993
DON HENDRIX, CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

THOMAS F. FRIEDBERG, ESQ. (#110439)
LAW OFFICES OF FRIEDBERG & BUNGE
Emerald Shapery Center
402 West Broadway, 25th Floor
San Diego, CA 92101
Telephone: (619) 557-0101
Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DAVID ETTINGER,
Plaintiff.

v.

PACTOW; "BARGE NUMBER ONE", her engines, apparel and furniture; and "BARGE NUMBER TWENTY-SIX", her engines, apparel and furniture,
Defendants.

Case No. 92 361 S (M)
[F.R.C.P. Rule 6(b); Rule 59(b)]

EX PARTE APPLICATION FOR ORDER ENLARGING TIME TO FILE A MOTION FOR NEW TRIAL

Plaintiff, DAVID ETTINGER, hereby applies for ex parte order enlarging the time within which to file a motion for a new trial pursuant to Federal Rules of Civil Procedure, Rule 59.

Judgment was entered in this matter in favor of defendant and against plaintiff on November 17, 1993. Under Rule 59(b), motion for a new trial must be filed and served no later than ten (10) days after entry of judgment.

In order to fully brief the issues, plaintiff respectfully requests that this Court enlarge the time to file a motion for a new trial to thirty (30) days from the date of entry of judgment. This procedure is authorized under Federal Rules of Civil Procedure, Rule 6(b).

On or about November 17, 1993, plaintiff's attorneys contacted defense counsel and requested that defense counsel stipulate to enlarging the time to bring a motion for a new trial. Defense counsel specifically refused to stipulate to extend the time more than the statutorily authorized ten (10) days.

Based thereupon, plaintiff respectfully request that this Court issue an ex parte order enlarging the time within which to file a motion for a new trial to thirty (30) days from the date of entry of judgment herein.

Dated: November 17, 1993

Respectfully submitted,

LAW OFFICES OF
FRIEDBERG & BUNGE

By: /s/ THOMAS F. FRIEDBERG
THOMAS F. FRIEDBERG, ESQ.
Attorneys for Plaintiff

IT IS SO ORDERED:

Dated: November 23, 1993

/s/ EDWARD J. SCHWARTZ
HONORABLE EDWARD J. SCHWARTZ

THOMAS F. FRIEDBERG, ESQ. (#110439)
SARAH L. BUNGE, ESQ. (#115499)
LAW OFFICES OF FRIEDBERG & BUNGE
Emerald Shapery Center
402 West Broadway, 25th Floor
San Diego, CA 92101
(619) 557-0101
Attorneys for Plaintiff, David Ettinger

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ETTINGER,
Plaintiff,

v.

PACTOW, et al.
Defendants.

Case No. 92 361 S (M)

PROOF OF SERVICE BY FACSIMILE AND U.S. MAIL

I, the undersigned individual, declare: That I am, and was at the time of service of the papers herein referred to, over the age of eighteen years, and not a party to the action; and I am employed in the County of San Diego, California, in which county the within-mentioned mailing occurred. My business address is 402 West Broadway, 25th Floor, San Diego, California. I served a copy of the following document(s):

EX PARTE APPLICATION FOR ORDER ENLARGING TIME TO FILE A MOTION FOR NEW TRIAL

by delivering by facsimile and U.S. mail a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

Party Served/ Status:	*Attorney of Record/ Address/Telephone:*
Defendant, FOSS MARITIME, INC.	WILLIAM H. COLLIER, JR., ESQ. MARK W. NELSON, ESQ. KEESAL, YOUNG & LOGAN P.O. Box 1730 Long Beach, CA 90801-1730 (310) 436-9051

I sealed each envelope and, with the postage thereon fully prepaid, deposited each in the United States mail at San Diego, California, on November 18, 1993.

I declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct.

This declaration is executed this 18th day of November, 1993.

/s/ DEBORAH S. WAY

APPENDIX 3

FILED FEBRUARY 23, 1994
DON HENDRIX, CLERK
U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

THOMAS F. FRIEDBERG, ESQ. (#110439)
LAW OFFICES OF FRIEDBERG & BUNGE
Emerald Shapery Center
402 West Broadway, 25th Floor
San Diego, CA 92101
Telephone: (619) 557-0101
Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DAVID ETTINGER,
Plaintiff,

v.

PACTOW; "BARGE NUMBER ONE", her engines, apparel and furniture; and "BARGE NUMBER TWENTY-SIX", her engines, apparel and furniture,
Defendants.

Case No. 92 361 S (M)

ORDER GRANTING PLAINTIFF'S MOTION FOR NEW TRIAL

Date: January 24, 1994
Time: 10:30 a.m.
Courtroom: 4

The motion of plaintiff, DAVID ETTINGER, for new trial pursuant to Federal Rules of Court, Rule 59, came on regularly for hearing on January 24, 1994, at 10:30 a.m., in

Courtroom 4, before the Honorable Edward J. Schwartz. Plaintiff, DAVID ETTINGER, by and through his attorneys of record, Friedberg & Bunge, by Thomas F. Friedberg; defendant, PACTOW, et al., appeared by and through its attorney of record, Keesal, Young & Logan, by Mark W. Nelson.

The Court, after having heard the evidence in the jury trial in the above-captioned matter, and after having reviewed the papers and affidavits in support of the motion and opposition of the motion for new trial:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Plaintiff's Motion for New Trial is considered timely by the Court.

2. The Court, having considered all of the papers and oral arguments, hereby grants plaintiff's Motion for New Trial.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the jury verdict in the above-captioned matter be, and hereby is, set aside, and that plaintiff's Motion for a New Trial is hereby granted.

Dated: February 22, 1994

EDWARD J. SCHWARTZ

HONORABLE EDWARD J. SCHWARTZ

APPENDIX 4

FILED MARCH 29, 1994
CATHY A. CATTERSON,
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID ETTINGER,
Plaintiff-Appellee,

v.

PACTOW; "BARGE NUMBER ONE", her engines, apparel and furniture, et al.,
Defendants-Appellants.

No. 94-55265
DC# CV-92-00361-EJS
Southern California
(San Diego)

ORDER

Before: FLETCHER, BRUNETTI and TROTT,
Circuit Judges

Appellants have filed a notice of appeal from the district court's order granting a motion for new trial. Generally, an order granting a motion for a new trial is not a final, appealable order. *See Roy v. Volkswagenwerk Aktiengesellschaft,* 781 F.2d 670 (9th Cir. 1985). Nevertheless, in the notice of appeal appellants argue that the notice of appeal is valid because the district court lacked jurisdiction to consider the motion for new trial since the motion was served more than 10 days after entry of judgment as prescribed by Fed. R. Civ. P. 59(e). It is clear from the record however, that the district court granted plaintiff an extension of time to file its motion for new trial and ultimately granted the

motion for new trial. Accordingly, appellants' argument that the district court lacked jurisdiction to grant the motion for new trial is without merit and this appeal is dismissed. *See id.*

APPENDIX 5

NOT FOR PUBLICATION

FILED JULY 1, 1994
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID ETTINGER,
Plaintiff-Appellee,

v.

PACTOW; "BARGE NUMBER ONE", her engines, apparel and furniture, et al.,
Defendants-Appellants.

No. 94-55265
D.C. No. CV-92-00361-EJS
Southern California
(San Diego)

ORDER

Before: FLETCHER, BRUNETTI and TROTT, Circuit Judges

Appellee's motion for reconsideration is denied.

APPENDIX 6

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT CIVIL APPEALS DOCKETING STATEMENT

DAVID ETTINGER,
Plaintiff.

v.

PACTOW; "BARGE NUMBER ONE", her engines, apparel and furniture; and "BARGE NUMBER TWENTY-SIX", her engineer, apparel and furniture,
Defendants.

District: Southern District

Judge: Edward J. Schwartz

Date Complaint Filed: March 9, 1992

District Court Docket Number: 92-361 S (M)

Date Notice of Appeal Filed: February 23, 1994

Is this a Cross-Appeal? ☐ Yes ☒ No

Has this matter been before this court previously? ☐ Yes ☒ No

JURISDICTION

1. FEDERAL
   - ☐ Federal Question
   - ☐ Diversity
   - ☐ Other (specify):
2. APPELLATE
   - ☐ Final Decision of District Court
   - ☒ Interlocutory Decision Appealable as of right see attached
   - ☐ Interlocutory Order certified by District Court Judge (specify):

☐ Other Property

DISTRICT COURT DISPOSITION

1. STAGE OF PROCEEDINGS
   - ☐ Pre-Trial
   - ☐ During Trial
   - ☐ After trial but after new trial was granted, without trial court's jurisdiction to do so (untimely)

2. TYPE OF JUDGMENT/ORDER APPEALED
   - ☐ Default Judgment
   - ☐ Judgment/Court Decision
   - ☐ Dismissal/Jurisdiction
   - ☐ Judgment/Jury Verdict
   - ☐ Dismissal/Merits
   - ☐ Summary Judgment
   - ☐ Judgment NOV
   - ☐ Declaratory Judgment
   - ☐ Directed Verdict
   - ☒ Other (specify):

   see attached

3. RELIEF
   - ☐ Damages: N/A

     Amount Sought: $_____

     Amount ☐ Granted:

     ☐ Denied $_____

   - ☐ Injunctions:

     ☐ Preliminary or ☐ Permanent

     ☐ Granted or ☐ Denied

Appeal concerns only the issue of authority to grant new trial beyond jurisdictional deadline.

BRIEF DESCRIPTION OF NATURE OF ACTION AND RESULT BELOW:

Plaintiff brought suit under the Jones Act (46 U.S.C. Section 688) and federal maritime law for personal injuries sustained on 3/9/91. On 11/17/93, the district court entered judgment for defendant/appellant after a jury returned a verdict in favor of defendant/appellant and against plaintiff. On 11/23/93, the district court granted plaintiff's request for an enlargement of time to file a motion for new trial under Rule 59 of the FRCP. Plaintiff filed his motion for new trial on 12/16/93 and served a copy of the motion on defendant/appellant on 12/17/93. By order dated 2/23/94, the district court granted plaintiff's motion for new trial on plaintiff's claim for unseaworthiness. This motion was granted despite defendant/appellants' objection that plaintiff's motion was untimely under Rule 6(a) and 59 of the FRCP.

ISSUES PROPOSED TO BE RAISED ON APPEAL:

1. Jurisdictional limitations on extending right to file motion for new trial under FRCP.

2. "Unique Circumstances" doctrine applies only to tolling of appeal period rather than new trial period following excused delay.

3. Ettinger's failure to comply with the requirements of the unique circumstances doctrine in the Ninth Circuit.

4. The complete disapproval of the Seventh Circuit's decision in *Eady v. Foerder,* 381 F.2d 980 (7th Cir. 1967) by all 7th Circuit panels both before and after that decision and the absence of any support or following by any other Circuit of the *Eady* decision.

BASED ON YOUR PRESENT KNOWLEDGE:

1. Does this appeal involve a question of first impression?
   __ Yes X No

2. Will the determination of this appeal turn on the interpretation or application of a particular case or statute?
   X Yes __ No

   Case name/statute: see attached

   Citation: _____

   Docket number, if unreported: _____

3. Is there any case now pending or about to be filed in this court or any other court or administrative agency which:

   a) Arises from substantially the same case or controversy as this appeal? __ Yes X No

   b) Involves an issue that is substantially the same, similar or related to an issue in this appeal?
      __ Yes X No

      Case name: _____

      Citation: _____

      Court or agency: _____

      Docket number, if unreported: _____

      _____

4. Will this appeal involve a conflict of law within the Ninth Circuit? __ Yes X No

   Among circuits? __ Yes X No

   If yes, explain briefly:

   _____

   _____

   _____

DOES THIS APPEAL INVOLVE ANY OF THE FOLLOWING:

__ Possibility of settlement;

__ Likelihood of a motion to expedite the appeal;

__ Multiple parties on either side for whom joint briefing is possible;

__ Likelihood of motions to intervene on appeal;

__ Likelihood of motions to file amicus briefs;

__ Likelihood of motions to stay appeal pending resolution of a related case. Identify case name, docket number and court or agency:

_____

X Other procedural complexities:
Stay of trial court's action is necessary to avoid rendering appeal moot. Action will be completed if appeal is successful.

COUNSEL FOR APPELLANT(S):

NAME: Robert D. Feighner; Mark W. Nelson, William H. Collier, Jr.

FIRM: Keesal, Young & Logan

ADDRESS: 310 Golden Shore, P.O. Box 1730, Long Beach, CA 90801-1730

TELEPHONE: (310) 436-2000

I CERTIFY THAT A COPY OF THIS CIVIL APPEALS DOCKETING STATEMENT WAS SUBMITTED TO THE CLERK OF THE DISTRICT COURT OR THE CLERK OF U.S. COURT OF APPEALS, AND THAT IT WAS SERVED ON EACH PARTY/COUNSEL SHOWN ON THE ATTORNEY'S SERVICE LIST.

/s/ ROBERT D. FEIGHNER	2/23/94
Signature	Date

REMEMBER TO ATTACH COPIES OF ORDER/JUDGMENT APPEALED FROM AND SERVICE LIST WITH TELEPHONE NUMBERS

Continuation

Civil Appeals Docketing Statement

In Re: Ettinger v. PACTOW, et al.
District Court # 92-361 S (M)

Jurisdiction:

Appellate: Interlocutory: new trial motion granted despite absence of jurisdiction due to delay.

Jones & Guerrero Co., Inc. v. Sealift Pac., 650 F.2d 1072 (9th Cir. 1981).

Eaton v. National Steel Products Co., 624 F.2d 863 (9th Cir. 1980).

District Court Disposition:

2. Type of Judgment/Order Appealed:

The order appealed from is the order granting a motion for new trial. While not ordinarily appealable, the order granting Ettinger's motion for new trial is directly appealable by virtue of the fact that the trial court was without jurisdiction to issue the order. (See cases cited above.) Specifically, the motion for order granting new trial was filed more than 10 days after the entry of judgment in violation of Rule 6(b) and 59 of the *Federal Rules of Civil Procedure*.

2. "Will the determination of this appeal turn on the interpretation or application of a particular case or statute?"

Yes — *Osterneck v. Ernst & Whinney*, 489 U.S. 169 (1989)
In Re Slimick, 928 F.2d 304 (9th Cir. 1990)
Feinstein v. Moses, 951 F.2d 16 (1st Cir. 1991)

FILED FEBRUARY 23, 1994
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

THOMAS F. FRIEDBERG, ESQ. (#110439)
LAW OFFICES OF FRIEDBERG & BUNGE
Emerald Shapery Center
402 West Broadway, 25th Floor
San Diego, CA 92101
Telephone: (619) 557-0101

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DAVID ETTINGER,
Plaintiff,

v.

PACTOW; "BARGE NUMBER ONE",
her engines, apparel and furniture; and
"BARGE NUMBER TWENTY-SIX",
her engines, apparel and furniture,
Defendants.

Case No. 92 361 S (M)

ORDER GRANTING PLAINTIFF'S MOTION FOR NEW TRIAL

DATE: January 24, 1994
TIME: 10:30 a.m.
CTRM: 4

The motion of plaintiff, DAVID ETTINGER, for new trial pursuant to Federal Rules Of Court, Rule 59, came on regularly for hearing on January 24, 1994, at 10:30 a.m., in Courtroom 4, before the Honorable Edward J. Schwartz.

Plaintiff, DAVID ETTINGER, by and through his attorneys of record, Friedberg & Bunge, by Thomas F. Friedberg; defendant, PACTOW, et al., appeared by and through its attorney of record, Keesal, Young & Logan, by Mark W. Nelson.

The Court, after having heard the evidence in the jury trial in the above-captioned matter, and after having reviewed the papers and affidavits in support of the motion and opposition of the motion for new trial:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Plaintiff's Motion for New Trial is considered timely by the Court.

2. The Court, having considered all of the papers and oral arguments, hereby grants plaintiff's Motion for New Trial.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the jury verdict in the above-captioned matter be, and hereby is, set aside, and that plaintiff's Motion for a New Trial is hereby granted.

Dated: February 22, 1994

/s/ EDWARD J. SCHWARTZ
HONORABLE EDWARD J. SCHWARTZ

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.:

I, Karen A. Stone, declare that I am employed in the county of Los Angeles, state of California. I am over the age of eighteen and not a party to the within action. My business address is 310 Golden Shore, Catalina Landing, P.O. Box 1730, Long Beach, California 90801-1730.

On February 23, 1994, I served the foregoing document described as CIVIL APPEALS DOCKETING STATEMENT on the parties in this action by placing true copies thereof enclosed in a sealed envelope addressed as follows:

Thomas F. Friedberg, Esq.
Law Offices of Friedberg & Bunge
Emerald Shapery Center
402 West Broadway, 25th Floor
San Diego, CA 92101

I deposited such envelope in the mail at 310 Golden Shore, Catalina Landing, Long Beach, California. The envelope was mailed with postage thereon fully prepaid.

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Long Beach, California in the ordinary course of business.

EXECUTED on February 23, 1994 at Long Beach, California.

I declare that I am employed in the office of a member of the bar at whose direction this service was made.

KAREN A. STONE

No. 94-581

SUPREME COURT, U.S.
FILED
OCT 28 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

FOSS MARITIME COMPANY,

Petitioner,

vs.

DAVID ETTINGER,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

THOMAS F. FRIEDBERG
Counsel of Record
SARAH L. BUNGE
LAW OFFICES OF
FRIEDBERG & BUNGE
Attorneys for Respondent
402 West Broadway
25th Floor
San Diego, California 92101
(619) 557-0101

5859
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTIONS PRESENTED

1. Does the Supreme Court have jurisdiction over a matter in which the Court of Appeals does not have jurisdiction because the matter is an interlocutory order rather than a final decision of the District Court?

2. Did the District Court have jurisdiction to determine whether the "unique circumstances" doctrine was applicable to this matter?

3. Was the District Court correct in applying the "unique circumstances" doctrine, which was formulated by this Court as an exception to the Federal Rules of Civil Procedure, Rule 6(b) provision prohibiting extensions of time, where Ettinger filed his motion for new trial beyond the time limit provided by Rule 59(b) because he relied on the District Court's order extending that time period?

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No. 94-581

In The

Supreme Court of the United States

October Term, 1994

FOSS MARITIME COMPANY,

Petitioner,

vs.

DAVID ETTINGER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

David Ettinger (hereinafter "respondent') respectfully opposes Foss Maritime Company's (hereinafter "petitioner") petition for a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit in this case.

STATEMENT OF JURISDICTION

This Court does not properly have jurisdiction of this matter, which is an appeal of the District Court's interlocutory order granting a motion for new trial. As the Ninth Circuit Court of

Appeals properly determined, this matter does not involve a final decision and, therefore, no appellate jurisdiction exists.[1]

STATEMENT OF THE CASE

Respondent filed his complaint on March 9, 1992, alleging unseaworthiness under general maritime and admiralty law and seeking maintenance and cure. Respondent's complaint further alleged causes of action for negligence under the Jones Act, 46 U.S.C. § 688 and general maritime and admiralty law. The issues regarding respondent's claims for maintenance and cure were bifurcated from the negligence and unseaworthiness claims. It was agreed that the maintenance and cure issues would be resolved in a bench trial after the conclusion of the jury trial on the other claims.

On November 2, 1993, the negligence and unseaworthiness claims came to trial before a jury. Judgment was entered on the jury verdict in favor of petitioner on November 17, 1993. Judgment in Civil Case, Appendix 1 to Petition for Writ of Certiorari. Respondent filed a motion on November 20, 1993, seeking enlargement of time within which to file a motion for a new trial under Federal Rules of Civil Procedure, Rule 59. *Ex Parte* Application for Order Enlarging Time to File A Motion for New Trial, Appendix 2 to Petition for Writ of Certiorari. Petitioner did not raise any jurisdictional issue or advise the court or respondent of any authority prohibiting enlargement of the time to file a motion for new trial.

On November 23, 1993, the District Court granted respondent's motion and issued an order enlarging the statutory time for respondent to file his motion for a new trial. Order, Appendix 2 to Petition for Writ of Certiorari. Pursuant to the District Court's order, and in reliance on it, respondent filed his

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1. *See* argument under Reasons for Denying the Writ, Point I, page 3.

motion for a new trial within the time period ordered by the District Court. On February 23, 1994, the District Court entered an order granting respondent's motion for a new trial. Order Granting Plaintiff's Motion for New Trial, Appendix 3 to Petition for Writ of Certiorari.

Petitioner then filed a notice of appeal and request for stay of all proceedings with the United States Court of Appeals for the Ninth Circuit. Petitioner's request for stay was denied on March 4, 1994. On March 29, 1994, the Ninth Circuit dismissed the appeal, ruling that the order for new trial was an interlocutory decision and that petitioner's contention was the District Court was without jurisdiction to grant the motion was without merit. Order, Appendix 4 to Petition for Writ of Certiorari.

On April 12, 1994, petitioner filed a motion for reconsideration of the order dismissing its appeal with the United States Court of Appeals for the Ninth Circuit. On July 1, 1994, the Ninth Circuit Court of Appeals denied the motion for reconsideration. Order, Appendix 5 to Petition for Writ of Certiorari. Trial of respondent's maintenance and cure claims is still pending.

REASONS FOR DENYING THE WRIT

I.

THIS COURT DOES NOT HAVE JURISDICTION TO HEAR THIS MATTER.

The threshold question in a petition for writ of certiorari is whether the District Court's order was an appealable order and, therefore, whether the matter was properly "in" the Court of Appeals. It is well-settled that if a Court of Appeals lacks jurisdiction because there has been no final judgment, the Supreme

Court also lacks jurisdiction to consider the matter. *Forsyth v. Hammond*, 166 U.S. 506, 513 (1897); *see also, Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737, 740, 744-45 (1976).

In the *Liberty Mutual* case, this Court held that the only authorization for an appeal from a District Court's order is pursuant to 28 U.S.C. §§ 1291 or 1292. This Court further held that in cases where issues of damages or other relief remain to be resolved, a decision rendered by the District Court is necessarily an interlocutory order and is not appealable. *Liberty Mutual* at 744. Respondent's right to damages and other relief has still to be resolved because a new trial has been ordered on the issues that were submitted to the jury. Moreover, the court has not yet rendered a decision on the separate matter of respondent's right to damages and other relief on his claim for maintenance and cure, which was not submitted to the jury but was to be determined later by the court.

The Ninth Circuit Court of Appeals correctly held that it does not have jurisdiction in this matter because an order granting a motion for a new trial is clearly not a final appealable order. *E.g., Roy v. Volkswagenwerk Aktiengesellschaft*, 781 F.2d 670 (9th Cir. 1985). Moreover, the District Court's order obviously does not fall within the few specific types of interlocutory decisions that are appealable pursuant to 28 U.S.C. § 1292. The Court of Appeals did not have jurisdiction to hear the appeal because there was neither a final appealable order nor a final judgment of respondent's right to damages and other relief. Therefore, this Court also lacks jurisdiction to hear this matter.

II.

THE DISTRICT COURT HAD JURISDICTION TO HEAR AND GRANT RESPONDENT'S MOTION FOR NEW TRIAL.

This Court enunciated the doctrine of "unique circumstances" as an exception to the Federal Rules of Civil Procedure, Rule 6(b) which prohibited the trial court from extending the statutory time limits for *both* filing motions for new trial *and* notices of appeal. The doctrine is now well-established and has been further refined by this Court. *E.g., Thompson v. Immigration and Naturalization Service*, 375 U.S. 384 (1964).[2]

By necessity, the District Court must have jurisdiction to determine whether "unique circumstances" exist which warrant an

---

2. The *Thompson* case involved an appeal which was not filed within the time period allowed by Federal Rules of Civil Procedure, Rule 73(a). In that case, the petitioner had failed to file his motion for new trial within the 10 day time period imposed by Rule 59. The trial court declared that it was timely but denied the motion for new trial on its merits. In reliance on the trial court's statement regarding the timeliness of the new trial motion, the petitioner filed his notice of appeal within 60 days of the trial court's denial of his motion for new trial (over seven months after entry of judgment).

At the time of the *Thompson* decision, the Rule 6(b) prohibition on time extensions applied both to motions for new trial and notice of appeal. The Federal Rules of Appellate Procedure had not yet been promulgated and Rule 73(a) of the Federal Rules of Civil Procedure provided that a notice of appeal must be filed within 60 days from the entry of judgment or alternately within 60 days from the date of an order denying a *timely* motion for new trial under Rule 59. At the time of the *Thompson* decision, Rule 6(b) specifically stated that the court "may not extend the time for taking any action under rules . . . *59(b)* . . . *and 73(a)* . . . except to the extent and under the conditions stated in them."

exception to the Rule 6(b) prohibition of time extensions. A court must always have jurisdiction to determine whether it has jurisdiction to hear a particular matter. *See, e.g., United States v. United Mine Workers of America*, 330 U.S. 258 (1947). The District Court in this matter clearly had jurisdiction to determine whether the "unique circumstances" doctrine was applicable and, thus, whether respondent's motion for new trial could be considered timely. Once a court has determined that it has not been deprived of jurisdiction, it may proceed with the case. *Ruby v. Secretary of the U.S. Navy*, 365 F.2d 385, 389 (9th Cir. 1966).

After the District Court found that sufficient unique circumstances existed, respondent's motion was deemed timely and the court then had jurisdiction to hear the motion for new trial. The District Court then properly exercised its jurisdiction to hear respondent's motion for new trial and granted the motion. The order granting the new trial is interlocutory and, therefore, neither petitioner's notice of appeal nor his petition for writ of certiorari have transferred jurisdiction and it remains with the District Court pending final judgment on all claims. *Cf. id.* at 388.

III.

EVEN ASSUMING ARGUENDO THAT APPELLATE JURISDICTION CU[illegible]ENTLY EXISTS IN THIS MATTER, THE EXER[illegible]ISE OF JUDICIAL DISCRETION TO GRANT A PETITION FOR A WRIT OF CERTIORARI SHOULD BE RESERVED FOR SPECIAL AND IMPORTANT SITUATIONS AND IS NOT WARRANTED IN THIS MATTER.

Rule 10(1) of the Rules of the United States Supreme Court states that "[a] review on writ of certiorari is not a matter of right, but of judicial discretion" and should be granted only "when special and important reasons" exist. The rule also provides

guidance as to the type of situations which are sufficiently "special and important" to warrant this Court's review on a writ of certiorari. The following four grounds apply to cases which have been litigated in federal court.

> 1. A United States Court of Appeals has rendered a decision that conflicts with the decision of another circuit on the same matter or with a state court of last resort.
>
> 2. The exercise of this Court's power of supervision is necessitated because a United States Court of Appeals has drastically deviated from the accepted and usual course of judicial proceedings or has approved such drastic departure by a lower court.
>
> 3. The petition involves a United States Court of Appeals decision on an important matter which has not been settled by this Court, but should be.
>
> 4. A United States Court of Appeals has rendered a decision on a federal question that conflicts with controlling decisions by this Court.

None of these grounds constitute a basis for granting review in this case and review by this Court is simply not necessary.

A. Petitioner Has Not Demonstrated Any Conflict Among the Circuit Courts as to the Ability of the Trial Court to Extend the Time to File a Motion for New Trial Under Rule 59(b).

Federal Rules of Civil Procedure, Rule 6(b), provides that a

court may not extend the time for taking any action under Rule 59(b). The circuits all recognize the validity of the Federal Rules of Civil Procedure so there is no conflict for this Court to resolve on that issue. The question in this case is not whether a trial court has the ability to extend the time to file a motion for new trial under Rule 59(b), but whether the "unique circumstances" exception to Rule 6(b) is applicable once the court has issued an order extending the time and a party has relied on that order.

Petitioner contends that there is a conflict between the circuits as to whether the "unique circumstances" doctrine can be applied to create an exception to the Rule 6(b) provision prohibiting the court from extending the various statutory time periods references in the rule. Petitioner's contention is flawed for several reasons. First, this Court initially formulated and subsequently applied the "unique circumstances" doctrine to create an exception *to the Rule 6(b) prohibition. See Thompson v. Immigration and Naturalization Service*, 375 U.S. 384, 387 (1964). *See, supra,* footnote 2.

Second, petitioner has not cited authority which establishes that there is, in fact, any conflict between the circuits on the issue of whether the doctrine should be applied after the court has determined that proper circumstances for its application exist. Petitioner has merely cited *Eady v. Foerder*, 381 F.2d 980 (7th Cir. 1967), a case where the court found that sufficiently "unique circumstances" existed and some cases where no such circumstances were found to exist. There is not a conflict merely because different facts require different results. Petitioner has not demonstrated any actual conflict.

B. Petitioner Has Not Demonstrated Any Conflict Among the Circuit Courts or Within the Ninth Circuit as to Whether the Question of Jurisdiction Is Appealable.

Petitioner next contends that there is a conflict among the

circuits as to whether a party may appeal an interlocutory order under circumstances where the trial court had no jurisdiction to issue the order. There is certainly no conflict and no question that lack of jurisdiction is always subject to review, however, that is not even the issue involved here. In this case, both the District Court and the Ninth Circuit found that the District Court had jurisdiction to grant respondent's motion for a new trial under the "unique circumstances" doctrine. The District Court applied the "unique circumstances" doctrine and found that respondent's motion should be deemed timely filed. The Court then exercised its jurisdiction to hear and determine the motion. Contrary to petitioner's contention, there was no "extra-jurisdictional grant of a motion for new trial" because the District Court had jurisdiction.

Petitioner also contends that when the Ninth Circuit dismissed its appeal, the dismissal was inconsistent with other Ninth Circuit opinions such as *Eaton v. National Steel Products Co.*, 624 F.2d 863 (9th Cir. 1980). Petitioner contends that "review is necessary to establish uniformity on the issue of appealability". Again, the cases cited by petitioner do not establish any conflict either among the various circuits or within the Ninth Circuit. The uniform rule is well established that an order granting a new trial is interlocutory in nature and not appealable. That was, in fact, the holding in this case as well as in the *Eaton* case. *Id.* at 864. Moreover, respondent's remedies on the maintenance and cure issues have not yet been tried in this case, and, therefore, an appeal of part of this case would violate the longstanding policy against piecemeal appeals. *See, id.*

There has been no "drastic deviation from the accepted and usual course of judicial proceedings" or any other special and important reason which would necessitate this Court's review.

IV.

THE TRIAL COURT AND NINTH CIRCUIT COURT OF APPEALS HAVE APPLIED THE "UNIQUE CIRCUMSTANCES" DOCTRINE AS DICTATED BY THIS COURT.

This Court held in *Thompson, supra,* that an otherwise untimely appeal would be acceptable because the appellant had relied upon the District Court's statement that appellant's motion for new trial had been filed in "ample time." The purpose behind this ruling was to allow the appeal to be heard on its merits and not be dismissed for procedural reasons when the appellant has relied upon the court's statement regarding the timing of an appeal.

Petitioner argues that this Court "narrowly limited" the *Thompson* holding to its facts in *Osterneck v. Ernst & Whinney,* 489 U.S. 169 (1989). The reason this Court did not apply the "unique circumstances" doctrine in *Osterneck* was that there was not any evidence of affirmative representations by the District Court to petitioners that their appeal was timely filed nor did the petitioners ever seek such assurance from the District Court or the Court of Appeals. *Id.* at 178-79.

Likewise, in the other cases cited by petitioner the critical consideration was whether a court had explicitly assured a party that their motion would be filed in a timely manner, not whether the document being filed was a motion for appeal or a motion for a new trial. *See In Re Slimick,* 928 F.2d 304, 309 n.7 (9th Cir. 1990) ("the bankruptcy court neither explicitly extended the deadline for appeal nor specifically assured appellants that the appeal period would not begin until entry of findings. *Id.*).

In *Eady v. Foerder,* 381 F.2d 1366 (7th Cir. 1967), the court applied the "unique circumstances" doctrine to deem timely the

filing of a motion for a new trial under Federal Rules of Civil Procedure, Rule 59(b). Petitioner argues that this case has been severely criticized within its own circuit citing, *Bailey v. Sharp*, 782 F.2d 1366, 1369-74 (7th Cir. 1986), and *Varhol v. National RR Passenger Corp.*, 909 F.2d 1557 (7th Cir. 1990).

What petitioner neglected to point out to this Court is that the opinion of the court is not the slightest bit critical of the "unique circumstances" doctrine or the *Eady* case. The only criticism occurs in the *concurring opinion* of Judge Easterbrook. *See Bailey* at 1369-74. In *Bailey*, the court applied the "unique circumstances" analysis and found that there was no reliance on any statement by the court so the motion could not be deemed timely filed. The Seventh Circuit held that the doctrine cannot apply when "counsel understand in fact that a motion for a new trial must be filed within 10 days." *Bailey* at 1369. The Seventh Circuit approved *Eady* and stated in the majority opinion that "*Eady* holds that when a judge extends the time within which to file an application for a new trial, and counsel relies to his detriment on that extension, the "unique circumstances" of this reliance allow the court to dispose of the matter before it." *Id.* at 1368. *Eady* adopted an equitable exception to a rigid time limitation when a lawyer relied on an "affirmative misstatement of a district judge." *Id.* The Seven Circuit's statements in *Bailey* can hardly be considered a criticism of *Eady*.

In *Varhol*, the full court heard the case *en banc* to consider whether to overrule *Eady*. A majority of the court as constituted did not vote to overrule *Eady* and the court stated "it remains as the law of this Circuit." 909 F.2d at 1560. In regards to the "unique circumstances" doctrine, the court stated that it was bound to follow *Thompson* and it would not speculate regarding *Thompson's* demise. This speculation would be inappropriate as the Supreme Court rejected a "unique circumstances" argument in *Osterneck* by distinguishing rather than overruling *Thompson*. *Id.* at 1562.

Thus, the cases regarding the *Eady* holding and the "unique circumstances" doctrine have been decided uniformly throughout the Seventh Circuit. Likewise, petitioner has failed to present a direct conflict among the circuits regarding the "unique circumstances" doctrine. The "unique circumstances" doctrine is a viable doctrine applied uniformly throughout the circuits when the facts of a case justify its utilization.

V.

THIS COURT HAS ALREADY SUPPLIED GUIDANCE UNDER *THOMPSON* AND ITS PROGENY AS TO THE APPLICATION OF THE "UNIQUE CIRCUMSTANCES" DOCTRINE.

In *Thompson,* this Court set out three factors to be considered when deciding if the "unique circumstances" doctrine is applicable to a case. These factors are: (1) whether the party did an act, which if properly done, postponed the deadline for filing the appeal, (2) if the District Court concluded these acts had been done properly, and (3) if the party relied on the District Court and filed the appeal within the assumed new deadlines, but beyond the old deadlines. *Thompson,* 375 U.S. at 387, 11 L. Ed. 2d 404. These factors are sufficient guidance as to the application of the "unique circumstances" doctrine.

While this Court has not specifically stated that the "unique circumstances" doctrine would apply to a motion for new trial under Federal Rules of Civil Procedure, Rule 59(b), such a specific statement is unnecessary because the doctrine was established as an exception to Federal Rules of Civil Procedure, Rule 6(b). *See supra,* footnote 2. The equitable policy behind the "unique circumstances" doctrine which prevents a party from being penalized for relying on a court's misstatement of the law is equally applicable under this situation. The Seventh Circuit has

already held this in the *Eady* case. Petitioner has not cited any case that has rejected this holding. Therefore, as this Court has already set clear guidelines for applying the "unique circumstances" doctrine and as there is not a conflict among the circuits, the petition for writ of certiorari should be denied.

CONCLUSION

For the foregoing reasons, respondent requests that this Court deny petitioner's petition for writ of certiorari.

Respectfully submitted,

THOMAS F. FRIEDBERG
Counsel of Record
SARAH L. BUNGE
LAW OFFICES OF
FRIEDBERG & BUNGE
Attorneys for Respondent
402 West Broadway
25th Floor
San Diego, California 92101
(619) 557-0101